Supreme Court, U.S.
MAR 2 1994

No. 93-1264

In The
SUPREME COURT OF THE UNITED STATES
October Term 1993

JOE JUNIOR COWAN,

Petitioner,

vs.

THE STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Montana

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH P. MAZUREK
Attorney General
BARBARA C. HARRIS*
Assistant Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026

*Counsel of Record

QUESTIONS PRESENTED

1. Does Montana's statutory scheme, which does not provide for an affirmative insanity defense, violate the Eighth or Fourteenth Amendment to the United States Constitution?

2. In this case, which involved a nonjury trial on a charge of attempted deliberate homicide, did the Montana statute which states that "[i]n a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear," result in the application of an impermissible presumption in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. MONTANA'S STATUTORY SCHEME, WHICH DOES NOT PROVIDE AN AFFIRMATIVE INSANITY DEFENSE, DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 6

II. MONTANA'S STATUTE REGARDING AN INFERENCE IN DELIBERATE HOMICIDE CASES DID NOT RESULT IN THE APPLICATION OF A CONCLUSIVE PRESUMPTION 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Drope v. Missouri,
420 U.S. 162 (1975) 12

Durham v. United States,
214 F.2d 862 (D.C. Cir. 1954) 10

Foucha v. Louisiana,
112 S. Ct. 1780 (1992) 12

Leland v. Oregon (1952),
343 U.S. 790,
reh. denied, 344 U.S. 848 (1952) 5, 8, 11, 12

Malinski v. New York,
324 U.S. 401 (1945) 9

Medina v. California,
112 S. Ct. 2572 (1992) 11

Pate v. Robinson,
383 U.S. 384 (1966) 12

Patterson v. New York,
432 U.S. 197 (1977) 11

Penry v. Lynaugh,
492 U.S. 302 (1989) 13

Powell v. Texas,
392 U.S. 514 (1968) 9, 11, 12

Sandstrom v. Montana,
442 U.S. 510 (1979) ..... i, 13, 14

TABLE OF AUTHORITIES
(Cont.)

Snyder v. Massachusetts,
291 U.S. 97 (1934) 9

Stanford v. Kentucky,
492 U.S. 361 (1989) 13

State v. Byers,
861 P.2d 860 (Mont. 1993) 4, 5

State v. Cowan,
861 P.2d 884 (Mont. 1993) 1

State v. Korell,
690 P.2d 992 (Mont. 1984) 4, 5

STATUTES

Montana Code Annotated, 1989
§ 45-5-102 1
§ 45-5-112 13
§ 45-6-204 1
§ 46-14-102 6
§ 46-14-103 6
§ 46-14-221 6
§ 46-14-222 6
§ 46-14-311 7
Tit. 46, ch. 18 7

United States Code
Tit. 28, § 1254(1) 1

TABLE OF AUTHORITIES
(Cont.)

CONSTITUTIONS

United States Constitution
Amend. VIII ..... i, 5, 6, 12, 13
Amend. XIV ..... i, 5, 6

JURISDICTION

Jurisdiction under 28 U.S.C. § 1254(1) exists with respect to the petition.

STATEMENT OF THE CASE

Following a bench trial held December 17-20, 1990, in Missoula County, Montana, the Petitioner was found guilty of attempted deliberate homicide, in violation of Mont. Code Ann. § 45-5-102 (1989), and aggravated burglary, in violation of Mont. Code Ann. § 45-6-204 (1989). He was thereafter committed to the Montana Department of Institutions for sixty (60) years for the attempted deliberate homicide and twenty (20) years for the aggravated burglary. The judgment provided that he be initially placed at the Montana State Prison, until such time as the director of the Department of Institutions determines that his treatment requires placement at a different facility. (Pet. App. 37a.)

Cowan appealed his convictions to the Montana Supreme Court. The convictions were affirmed in *State v. Cowan*, 861 P.2d 884 (1993). (Pet. App. 1a.)

In April 1990 Cowan entered, without permission, the residence of Forest Service worker Margaret Doherty, located at a Forest Service Work Center near Lolo, Montana. When Doherty returned to the Center, she discovered someone had been occupying the residence, but did not immediately find Cowan. While she was on the telephone attempting to find out whether another worker may have been assigned to the center, she heard someone on the line. She assumed that someone was listening on one of the other two lines of the center, and she told the person to get out, that she was calling the police.

While Doherty was on the telephone with the sheriff's department in Missoula, approximately 18 miles away, she saw Cowan approach the house. She locked the front door, confirmed that the other doors and the windows were locked, and got a shotgun she kept at the house. Cowan started banging on the living room door and Doherty yelled, "Who are you and what do you want?" Cowan did not respond. Doherty went to the kitchen and loaded the shotgun with the only shells available, scatter shells used to scare bears. Cowan moved around the house to the kitchen door, trying the doorknob and banging on the door. Doherty again yelled, "Who are you and what do you want?" to which Cowan made comments like "society bitch" and "robot bitch." He would also mimic her when she would ask him who he was. At times he would look her in the eye through a window. When the sheriff's dispatch operator asked Doherty if there was some way she could leave, Doherty looked through a window and saw that the tires on her vehicle had been flattened.

As Doherty watched, Cowan went to her car and kicked at it, and pulled on the license plate on the back. Doherty then lost sight of him until he exited the nearby cookhouse carrying a tree-planting tool called a hodag. By looking at Cowan, Doherty judged that he was angry and serious.

Cowan approached the living room doors and smashed through both the outer door and the inner, heavier door with the hodag. When Doherty raised her shotgun to discharge a scatter shell in the direction of Cowan, the shotgun jammed and she was unable to pull the trigger completely. Cowan came across the living room at Doherty with the hodag in both hands, up like a baseball bat. Doherty backed into the kitchen and started working to get the door open. She was unable to do so before Cowan attacked her with the hodag, hitting her arms, back and shoulders. He continued to swing the hodag; eventually he

wrestled the shotgun from Doherty, but when he was unable to pull the trigger, he discarded it and picked up the hodag again. He also paused at one point to get a knife, which he discarded without using. Doherty suffered severe injuries to her skull, shoulder, ribs, and lung.

When sheriff's deputies arrived at the scene, one found Doherty lying in the kitchen. As the deputy started to search for Cowan, he was notified by the other deputy that Cowan was running into the woods. The other deputy testified that Cowan had disregarded her order to stop where he was. He said something about a backpack and ran around the cookhouse. Cowan was apprehended near the cookhouse and a Forest Service backpack was on the ground next to him.

At trial, the Petitioner presented testimony of a psychiatrist and a clinical psychologist. The psychiatrist did a mental status examination of Cowan during their one meeting and reviewed Cowan's prior mental health records. The psychiatrist concluded that Cowan suffers at times from schizophrenia, and that when he attacked Doherty, he was schizophrenic and in a psychotic state. As to the element of the crime charged relating to Cowan's mental state, the psychiatrist stated that, although he could have acted with purpose and knowledge, he did not have the conscious object to cause the death of a human being. On cross-examination, he admitted that, because he had not done a full forensic evaluation (including obtaining information from people who had observed Cowan before, during, and after the attack), he was not able to answer many questions related to the issue of whether Cowan had the alleged mental states during the commission of the crimes.

The psychologist concluded that Cowan suffers from paranoid schizophrenia and that he was "acting purposefully and knowledgeably in defending himself against a robot" during the attack of Doherty. He based this conclusion on

his assertion that Cowan experienced a sudden onset of psychosis just before the attack.

The State presented on rebuttal the testimony of Herman Walters, a psychologist, who also evaluated the defendant. During his first interviews with Walters, Cowan described Doherty as a very large, white woman. In the final interview, he referred to her as a robot. Walters concluded that Cowan suffers from paranoid schizophrenia. Walters initially considered the possibility that Cowan was malingering or falsifying during the evaluation, given Cowan's intelligence, his knowledge of psychotic behavior gained during prior hospitalizations, and the clear motive for such behavior by Cowan. He eventually concluded that Cowan was not malingering, but may have been exaggerating his condition. Walters testified that, although he does not think it possible to state with accuracy what is going through a person's mind, his opinion was that Cowan was able to act with purpose or knowledge at the time of the offenses.

The trial court entered findings of fact summarizing the facts of the attack and the arrest. The findings also referred to Cowan's prior arrest and mental health treatments. The court concluded that during his entry to the residence and his attack on Doherty, Cowan had the purpose to commit a deliberate homicide; he knew it was highly probable that the death of a human being would be caused by his attack. (Pet. App. 33a.)

On appeal, the Montana Supreme Court, following its review of the evidence supporting the convictions, stated:

> We have previously affirmed the constitutionality of the abolition of the insanity defense in terms of violation of the right to due process. [*State v.*] *Byers*, [861] P.2d [860, 867 (Mont. 1993)]; [*State v.*] *Korell*,

> 690 P.2d [992] at 1002 [(Mont. 1984)]. As we noted in *Byers* and *Korell*, the United States Supreme Court has determined that the Due Process Clause does not require the use of any particular insanity test or allocation of burden of proof. *Leland v Oregon* (1952), 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302, reh. denied, 344 U.S. 848 [(1952)].

(Pet. App. 9a.) As to Cowan's claim that his sentence violates the Eighth Amendment to the Constitution, the Court held:

> We reiterate that Cowan was not sentenced to prison, but was placed in the custody of the Department of Institutions. The court specifically stated its purpose to provide for treatment of Cowan's mental illness at a different facility if the Director of the Department of Institutions determines treatment at a different facility is needed.
>
> We hold that the sentence imposed by the District Court does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

(Pet. App. 11a.)

SUMMARY OF THE ARGUMENT

The questions presented by the Petitioner do not raise significant constitutional or federal questions worthy of consideration by this Court. The decision of the Montana Supreme Court upholding Montana's statutes does not conflict with decisions of this Court. Contrary to

the Petitioner's assertion, the issues raised by the Petitioner have been settled by this Court and the Montana Supreme Court decision is consistent with such relevant precedent. Montana's statutes regarding mental disease or defect do not violate the Eighth or Fourteenth Amendment to the Constitution and the statute regarding an inference of mental state in a deliberate homicide did not result in the application of a conclusive presumption in this case.

----------♦----------

ARGUMENT

I. MONTANA'S STATUTORY SCHEME, WHICH DOES NOT PROVIDE AN AFFIRMATIVE INSANITY DEFENSE, DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioner asserts that Montana's statutory scheme is unconstitutional. He argues that this Court has not decided the issue of whether an affirmative insanity defense is required by the Constitution and that this case should be reviewed to decide that issue. The Petitioner's argument is stated in general terms and is unsupported by legal authority.

Montana's criminal procedure code allows consideration of a defendant's mental disease or defect at three stages of the criminal justice process. First, the defendant may be examined to determine whether he is able to understand the proceedings against him or to assist in his own defense. Mont. Code Ann. § 46-14-103 (1989). His fitness to proceed is a determination made by the district court prior to trial. Mont. Code Ann. §§ 46-14-221 and -222 (1989).

Second, a defendant may introduce evidence of mental disease or defect at trial whenever it is relevant to prove that he did not have a state of mind which is an element of the offense charged. Mont. Code Ann. § 46-14-102 (1989). Third, a defendant who has been convicted of a crime may claim during sentencing that at the time of the offense he was suffering from a mental disease or defect which "rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law." Mont. Code Ann. § 46-14-311 (1989). A sentencing court presented with such a claim must examine all relevant evidence introduced at trial and any additional relevant evidence presented before the sentence is imposed. *Id.* If the court finds that the defendant was not suffering from a mental disease or defect described in Mont. Code Ann. § 46-14-311, it must sentence him as required in Mont. Code Ann. tit. 46, ch. 18 (1989).

Thus, the statutes provide consideration of a mental disease or defect during a pretrial competency review, during trial, and during sentencing. However, the defense of mental disease or defect is not an affirmative defense at the trial or guilt phase. A defendant is not required to disprove the mental state element of the crime charged; at most, a defendant must produce enough evidence to raise a reasonable doubt as to that element. Such production of evidence would lead to an acquittal, as the state is required to prove all elements of the crime beyond a reasonable doubt. In sum, the law allows conviction of a person who has a mental disease or defect but who formed the requisite mental state.

In this case, Cowan's mental disease or defect was considered at all stages of his criminal prosecution. Prior to trial, he was evaluated and, at one time, declared incompetent to stand trial. Thereafter, he was found competent and was tried for attempted deliberate homicide

and aggravated burglary. The court, as factfinder, found that he had acted with the mental state required for the charged crimes, i.e., that he acted purposely and knowingly when committing the crimes. At the sentencing phase of his case, Cowan's schizophrenia was considered and the court sentenced him to the state department of institutions, with determination of his placement to be made pursuant to his need for treatment.

In *Leland v. Oregon*, 343 U.S. 790 (1952), this Court reviewed Oregon statutes which required a defendant to establish his insanity beyond a reasonable doubt. Relying on the fact that the prosecution was required to prove every element of the charged crime beyond a reasonable doubt, the Court held that the statutes do not violate due process. The Court's discussion of the Due Process Clause included the following:

> Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is

> plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).
>
> Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. . . . "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review." MR. JUSTICE FRANKFURTER, concurring in *Malinski v. New York*, 324 U.S. 401, 417 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

343 U.S. at 798-99 (footnote omitted, emphasis added).

In *Powell v. Texas*, 392 U.S. 514 (1968), this Court discussed the criminal responsibility of persons alleging disease or diminished mental capacity. In refusing to state a constitutional rule regarding the consideration of such claims, the Court stated:

> We cannot cast aside the centuries-long evolution of the collection of

interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham v. United States*, 94 U.S. App. D.C. 228, 241, 214 F.2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e.g.*, the right-wrong test of M'Naghten's Case. The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. . . . But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and

> psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

392 U.S. at 535-37 (footnotes omitted, emphasis added).

The holdings of *Powell* and *Leland* were recently affirmed in *Medina v. California*, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), wherein this Court reviewed California statutes requiring a defendant who alleges that he is incompetent to stand trial to bear the burden of proving so by a preponderance of the evidence. Initially, the Court restated the standard set out in *Leland* (and later *Patterson v. New York*, 432 U.S. 197 (1977)) for determining whether the Due Process Clause is violated, declaring it to be the proper analytical approach:

> "Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"

112 S. Ct. at 2577, *quoting Patterson v. New York*, 432 U.S. at 201-02 (citations omitted).

The Court went on to hold that the rule allocating to the defendant the burden of proving competence to stand trial does not offend due process. In reaching that conclusion, the Court made the following statement:

> [W]hile the Due Process Clause affords an incompetent defendant the right not to be tried, *Drope v. Missouri*, *supra*, 420 U.S. [162] at 172-173, 95 S. Ct. [896] at 904 [1975]; *Pate v. Robinson*, *supra*, 383 U.S. [384] at 386, 86 S. Ct. [836] at 842 [1966], we have not said that the Constitution requires the States to recognize the insanity defense. See, *e.g.*, *Powell v. Texas*, 392 U.S. 514, 536-37, 88 S. Ct. 2145, 2156-57, 20 L. Ed. 2d 1254 (1968).

Thus, this Court has clearly reiterated the standard for determining whether a criminal procedure violates due process and has specifically held that the Constitution does not require that a state recognize and use any specific insanity defense.[1] Given these rulings, Cowan cannot persuasively argue that the issue of whether Montana's statutes violate the Constitution is unsettled. Cowan's contention that the criminal law must recognize a person's diminished capacity by allowing a person to present an affirmative defense of insanity is exactly the premise that this Court rejected in *Powell* and *Leland*.

Cowan's assertion that the Eighth Amendment requires the availability of a specific insanity defense is also unsupported. Cowan's nonspecific argument on this point refers to a traditional concept of criminal culpability. But he does not articulate how his treatment pursuant to Montana statutes violates his right to be free from cruel and unusual punishment. The sentence imposed in this case recognizes Cowan's potential need for treatment outside the prison setting and allows alternative placement.

---

[1]*See also Foucha v. Louisiana*, 112 S. Ct. 1780, 1790 (O'Connor, concurring), 1794-95 (Kennedy, dissenting) (1992).

This Court's holdings regarding the Eighth Amendment do not support the Petitioner's assertion that mental capacity provides a basis for finding cruel and unusual punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not categorically prohibit execution of mentally-retarded capital murderer); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (death sentence of petitioner who was approximately 17 years old at the time of the offense was not violative of the Eighth Amendment). The Court should not consider this meritless claim.

II. MONTANA'S STATUTE REGARDING AN INFERENCE IN DELIBERATE HOMICIDE CASES DID NOT RESULT IN THE APPLICATION OF A CONCLUSIVE PRESUMPTION.

Cowan argues that the following Montana statute constitutes a conclusive presumption of the type declared unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510 (1979): "In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear." Mont. Code Ann. § 45-5-112 (1989). He contends that the statute resulted in the application of an irrebuttable presumption which precluded consideration of his mental condition as it related to the mental state required for the charged offenses.

This statute was not discussed at trial. Because the trial was held before the court, rather than a jury, there is no indication in the record that the statute was specifically considered; there was no homicide committed. The Montana Supreme Court, relying on its relevant precedent, held that "Section 45-5-112, MCA, establishes a permissive inference, not a conclusive presumption." (Pet. App. 9a.)

Cowan cannot establish that application of the above statute resulted in a due process violation in this case. Contrary to the facts of *Sandstrom*, there is no basis in the facts of this case or the language of this statute, which supports a finding that the factfinder applied a conclusive presumption to relieve the state of its burden to prove beyond a reasonable doubt the mental elements of the crimes charged.

CONCLUSION

The Petitioner has failed to demonstrate adequate grounds for consideration by this Court of the questions presented and the petition should be denied.

Respectfully submitted,

JOSEPH P. MAZUREK
Attorney General
BARBARA C. HARRIS*
Assistant Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026

*Counsel of Record

February 1994